Supreme Court, U.S.
FILED
SEP 11 1992
OFFICE OF THE CLERK

No. 91-904

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

CONCRETE PIPE AND PRODUCTS OF CALIFORNIA, INC.,
Petitioner,

v.

CONSTRUCTION LABORERS PENSION TRUST
FOR SOUTHERN CALIFORNIA,
Respondent.

**On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit**

BRIEF OF THE PENSION BENEFIT GUARANTY CORPORATION AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

CAROL CONNOR FLOWE *
General Counsel
JEFFREY B. COHEN
Deputy General Counsel
ISRAEL GOLDOWITZ
Assistant General Counsel
RUSSELL G. GALER
NATHANIEL RAYLE
Attorneys

PENSION BENEFIT GUARANTY
CORPORATION
2020 K Street, N.W.
Washington, D.C. 20006
(202) 778-8820

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

	Page
INTEREST OF THE AMICUS CURIAE	1
STATEMENT	1
A. Congress's Response to a Faltering Multiemployer Plan Program	1
B. The Special Nature of Multiemployer Pension Plans	4
C. The Statutory Process For Calculating Withdrawal Liability	6
SUMMARY OF ARGUMENT	11
ARGUMENT	
I. CONGRESS'S CHOSEN METHOD FOR RESOLUTION OF WITHDRAWAL LIABILITY DISPUTES DID NOT DENY CONCRETE PROCEDURAL DUE PROCESS	12
A. Enrolled Actuaries, Not Plan Trustees, Are Responsible for Selecting Actuarial Assumptions	13
B. The Presumption Afforded the Factual Determinations of Plan Trustees Does Not Violate Procedural Due Process	17
1. Plan Trustees Perform No Quasi-Judicial Function and Have No Disabling Bias	17
2. A MPPAA Arbitration Provides an Employer with a Full and Fair Opportunity to Challenge a Withdrawal Liability Assessment	19
II. CONCRETE'S SUBSTANTIVE DUE PROCESS AND TAKINGS CHALLENGES ARE CONTROLLED BY *CONNOLLY* AND *GRAY*	22
A. MPPAA Did Not Deny Concrete Substantive Due Process	22
B. The Imposition of Withdrawal Liability Is Not a Taking of Concrete's Property Under the Fifth Amendment	28
CONCLUSION	30

TABLE OF AUTHORITIES

CASES CITED	Page
Anita Foundations, Inc. v. ILGWU Nat'l Retirement Fund, 902 F.2d 185 (2d Cir. 1990)	18
Bituminous Coal Operators Ass'n v. Connors, 867 F.2d 625 (D.C. Cir. 1989)	6
Board of Trustees v. Thompson Bldg. Materials, 749 F.2d 1396 (9th Cir. 1984), *cert. denied*, 471 U.S. 1054 (1985)	12
British Motor Distribs. v. San Francisco Automotive Indus. Welfare Fund, 882 F.2d 371 (9th Cir. 1989)	5
Building Servs. Employees Pension Trust v. Ogden Allied Servs. Corp., 10 Employee Benefit Cas. ("E.B.C.") 1401 (1988) (Brand, Arb.)	21
Carnation Co. v. Central States Pension Fund, 9 E.B.C. 1409 (1988) (Nagle, Arb.)	14, 16
Casablanca Indus. v. UFCW Local 23-Giant Eagle Pension Fund, 7 E.B.C. 2705 (1986) (Jaffe, Arb.), *aff'd in part sub nom. Huber v. Casablanca Indus.*, No. 87-0077 (W.D. Pa. Oct. 30, 1989), *aff'd*, 916 F.2d 85 (3d Cir. 1990), *petition for cert. filed*, 59 U.S.L.W. 3503 (U.S. Jan. 9, 1991)	14, 16, 18
Central States, S.E. and S.W. Areas Pension Fund v. Gerber Truck Serv., 870 F.2d 1148 (7th Cir. 1989)	4, 5, 26
Central States Pension Fund v. Bellmont Trucking Co., 610 F. Supp. 1505 (N.D. Ind. 1985), *aff'd*, 788 F.2d 428 (7th Cir. 1986)	25
Chicago Truck Drivers Pension Fund v. Louis Zahn Drug Co., 890 F.2d 1405 (7th Cir. 1989)	10
Connolly v. PBGC, 475 U.S. 211 (1986)	*passim*
Connolly v. PBGC, 581 F.2d 729 (9th Cir. 1978), *cert. denied*, 440 U.S. 935 (1979)	4
Del Monte Corp. v. Bakery & Confectionery Union & Indus. Pension Fund, 8 E.B.C. 1574 (1986) (Nagle, Arb.)	21
Ferguson v. Skrupa, 372 U.S. 726 (1963)	23, 24
Grand Union Co. v. Food Employers Labor Relations Ass'n, 808 F.2d 66 (D.C. Cir. 1987)	9

TABLE OF AUTHORITIES—Continued

	Page
H.C. Elliott, Inc. v. Carpenters Pension Trust Fund, 13 E.B.C. 1962 (1991) (Kagel, Arb.)	20
Hurd v. Hutnik, 419 F. Supp. 630 (D.N.J. 1976)	6
Keith Fulton & Sons v. New England Teamsters & Trucking Indus. Pension Fund, 762 F.2d 1137 (1st Cir. 1985) (en banc)	12, 14, 16
Keyes v. School Dist. No. 1, 413 U.S. 189 (1973)	20
Lavine v. Milne, 424 U.S. 577 (1976)	16, 20
Lewis v. Benedict Coal Corp., 361 U.S. 459 (1960)	5
Local Union 5, Sheet Metal Workers' Int'l Ass'n v. Mahoning & Trumbull County Bldg. Trades Welfare Fund, 541 F.2d 636 (6th Cir. 1976)	5
Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886 (1992)	28
Marshall v. Jerrico, 446 U.S. 238 (1980)	17, 18
Mathews v. Lucas, 427 U.S. 495 (1976)	19
Michigan United Food and Commercial Workers Pension Fund v. Eberhard Foods, Inc., 831 F.2d 1258 (6th Cir. 1987)	15
Mobile, J. & K.C. Ry. v. Turnipseed, 219 U.S. 35 (1910)	20
Nachman Corp. v. PBGC, 446 U.S. 359 (1980)	1, 2, 4
Nachman Corp. v. PBGC, 592 F.2d 947 (7th Cir. 1979)	27
National R.R. Passenger Corp. v. Atchison, T. & S.F. Ry., 470 U.S. 451 (1985)	23
NLRB v. Amax Coal Co., 453 U.S. 322 (1981)	29
Noble State Bank v. Haskell, 219 U.S. 104 (1911)	29
Norman v. Baltimore & O. R.R., 294 U.S. 240 (1935)	27
O'Hare v. General Maripe Transp. Corp., 740 F.2d 160 (2d Cir. 1984), *cert. denied*, 469 U.S. 1212 (1985)	5, 26
PBGC v. R.A. Gray & Co., 467 U.S. 717 (1984)	*passim*
Peick v. PBGC, 724 F.2d 1247 (7th Cir. 1983), *cert. denied*, 467 U.S. 1259 (1984)	23
Peick v. PBGC, 539 F. Supp. 1025 (N.D. Ill. 1982)	29
Philadelphia, B. & W. Ry. v. Schubert, 224 U.S. 603 (1912)	27

TABLE OF AUTHORITIES—Continued

	Page
PTMA-ILA Pension Fund v. E.W. Coslett & Sons, Inc., 6 E.B.C. 2705 (1985) (Jaffe, Arb.)	21
Republic Indus. v. Teamster Joint Council No. 83, 718 F.2d 628 (4th Cir. 1983), *cert. denied*, 467 U.S. 1259 (1984)	12
Roark v. Boyle, 439 F.2d 497 (D.C. Cir. 1970)	26
Stanley v. Illinois, 405 U.S. 645 (1972)	19
Stump v. Sparkman, 435 U.S. 349 (1978)	17, 18
Taylor v. Hayes, 418 U.S. 488 (1974)	18
Textile Workers Pension Fund v. Standard Dye & Finishing Co., 725 F.2d 843 (2d Cir.), *cert. denied*, 467 U.S. 1259 (1984)	12
Tumey v. Ohio, 273 U.S. 510 (1927)	18
United Mine Workers of America Health and Retirement Funds v. Robinson, 455 U.S. 562 (1982)	27
United Retail & Wholesale Employees Teamsters Union Local No. 115 Pension Plan v. Yahn & McDonnell, Inc., 787 F.2d 128 (3d Cir. 1986), *aff'd by equally divided vote sub nom. PBGC v. Yahn & McDonnell, Inc.*, 481 U.S. 735 (1987)	12
United States Dep't of Agric. v. Murry, 413 U.S. 508 (1973)	19
Usery v. Turner Elkhorn Mining Co., 428 U.S. 1 (1976)	*passim*
Vlandis v. Kline, 412 U.S. 441 (1973)	19
Wachtell, Lipton, Rosen & Katz v. Commissioner, No. 14574-90, slip op. (T.C. July 14, 1992)	7
Washington Star Co. v. International Typographical Union Negotiated Pension Plan, 729 F.2d 1502 (D.C. Cir. 1984)	12, 20
Washington Star Co. v. International Typographical Union Negotiated Pension Plan, 582 F. Supp. 301 (D.D.C. 1983)	5, 26
Williamson v. Lee Optical Co., 348 U.S. 483 (1955)	23, 24
Withrow v. Larkin, 421 U.S. 35 (1975)	22
Woodward Sand Co. v. Operating Eng'rs Pension Trust, 3 E.B.C. 2351 (1982) (Kaufman, Arb.)	17

TABLE OF AUTHORITIES—Continued

STATUTES AND REGULATIONS CITED

	Page
26 U.S.C. Section 401(a)	6
Section 411(d)(6)	7
Section 412(c)(3)(A)	7, 14
Section 413(b)(7)	6
Section 413(c)(2)	6
Section 7701(a)(35)	6
29 U.S.C. Section 186(c)(5)	4, 6
Section 1001a(a)(4)	25
Section 1001a(c)(2)	25
Section 1001a(c)(3)	25
Section 1002(34)	4
Section 1002(35)	4
Section 1002(37)	4
Section 1053	4
Section 1053(b)(1)	5
Section 1060(a)	5
Section 1081(a)(8)	4
Section 1082(c)(3)(A)	7, 14
Section 1082(c)(9)	6
Section 1108(c)(2)	18
Section 1241	6
Section 1242	6
Section 1242(b)	14
Section 1301(a)(3)	4
Section 1302(a)	2
Section 1302(a)(1)	1
Section 1302(b)(1)	1
Section 1306 (1976)	2
Section 1321(b)(1)	4
Section 1323	18
Section 1361	1
Section 1361 (1976)	2
Section 1362(b) (1976)	2
Section 1364 (1976)	2, 6, 24
Section 1381 (1976)	2
Section 1381(b)(1)	6
Section 1381(c)(2)-(4) (1976)	2
Section 1383	8
Section 1383(a)	21

TABLE OF AUTHORITIES—Continued

	Page
Section 1383(e)	21
Section 1384	21
Section 1385	8
Section 1385(b)(2)(A)(i)	21
Section 1391	8
Section 1391(b)	8
Section 1391(b)(1)	8
Section 1391(b)(2)(E)	8, 20
Section 1391(b)(3)(B)	8
Section 1391(b)(4)	8
Section 1391(c)(1)	8
Section 1391(c)(4)	23
Section 1393(a)	7, 15
Section 1393(b)(1)	6
Section 1393(c)	8
Section 1394(a)	8
Section 1394(b)	8
Section 1397	21
Section 1398(2)	21
Section 1399(b)(1)	9
Section 1399(b)(2)	9
Section 1399(c)(1)	24, 28
Section 1401	11
Section 1401(a)	11, 19
Section 1401(a)(2)	9
Section 1401(a)(3)	12, 13, 22
Section 1401(a)(3)(A)	10, 12, 20
Section 1401(a)(3)(B)	10, 13, 15
Section 1401(a)(3)(B)(i)	15
Section 1401(a)(3)(B)(ii)	15
Section 1401(b)(2)	10
Section 1401(c)	10, 13
Section 1405	8
Section 1431	1
20 C.F.R. § 901.1.-.71	6
29 C.F.R. § 2530.210(c)(1) (1991)	5
pt. 2641	9, 19
§ 2641.3(b)	19
§ 2641.3(c)	19

TABLE OF AUTHORITIES—Continued

	Page
§ 2641.4	19
§ 2641.4(a)(1)	10, 21
§ 2641.4(a)(2)	9
§ 2641.4(a)(4)	10
§ 2641.5	19
§ 2641.5(c)	9
§ 2641.5(d)	9
§ 2641.5(e)(3)	9
§ 2641.5(g)	10
§ 2641.7(a)(1)	10
§ 2642.2	8

ACTS OF CONGRESS CITED

Employee Retirement Income Security Act of 1974, Title IV, 29 U.S.C. §§ 1301-1461 (1988)	1
Multiemployer Pension Plan Amendments Act of 1980, Pub. L. No. 96-364, 94 Stat. 1208	1

LEGISLATIVE MATERIALS CITED

126 Cong. Rec. S10100 (daily ed. July 29, 1980)	3
126 Cong. Rec. S23288 (daily ed. Aug. 26, 1980)	18
126 Cong. Rec. H7899 (daily ed. Aug. 26, 1980)	10
S. Rep. No. 383, 93d Cong., 2d Sess. (1974)	14
H.R. Rep. No. 807, 93d Cong., 2d Sess. (1974)	14
H.R. Rep. No. 869, 96th Cong., 2d Sess. (1980)	3, 15, 16, 24
Multiemployer Pension Plan Termination Insurance Program: Hearings before the Subcomm. on Oversight of the House Comm. on Ways and Means, 96th Cong., 1st Sess. (1979)	5
Sen. Comm. on Labor and Human Resources, 96th Cong., 2d Sess., *S. 1076: The Multiemployer Pension Plan Amendments Act of 1980: Summary and Analysis of Consideration* (Comm. Print 1980)	15, 16

OTHER AUTHORITIES CITED

D. McGill, *Fundamentals of Private Pensions* (5th ed. 1984)	7, 23, 25

TABLE OF AUTHORITIES—Continued

	Page
Frank Cummings and Alicia Kershaw, *Multiemployer Plans—Special Rules*, 359-2d Tax Mgmt. (BNA) (1990)	23, 25
Gerald Cole and Ellen Hennessy, *Multiemployer Withdrawal Liability*, 1 Pens. and Profit Sharing (P-H) (1984)	24
J. Stephen Caflisch, *Employer Withdrawal Liability Under the Multiemployer Pension Plan Amendments Act of 1980*, 9 Pens. Rep. (BNA) (1982)	23
PBGC Op. Ltr. 91-7 (Oct. 1, 1991)	9, 19
Pension Benefit Guaranty Corporation, *Multiemployer Study Required by P.L. 95-214* (1978)	2
Prohibited Transaction Exemption 76-1, 41 Fed. Reg. 12740 (1976)	18
9 *Wigmore on Evidence* § 2486 (Chadbourne rev. ed. 1981)	21

INTEREST OF THE AMICUS CURIAE

Amicus curiae the Pension Benefit Guaranty Corporation ("PBGC")[1] is the federal agency charged by Congress with the responsibility for administering and enforcing Title IV of the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), 29 U.S.C. §§ 1301-1461 (1988), including the provisions of the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"), Pub. L. No. 96-364, 94 Stat. 1208, at issue here.[1] PBGC insures the payment of certain pension benefits to participants in, *inter alia*, insolvent multiemployer pension plans. 29 U.S.C. §§ 1361, 1431. Among the PBGC's purposes is "encourag[ing] the continuation and maintenance of voluntary private pension plans for the benefit of their participants." 29 U.S.C. § 1302(a)(1).

This case involves constitutional challenges to provisions in MPPAA that are intended both to protect PBGC's multiemployer pension plan insurance program and to bolster the statutory objective of encouraging the continuation and maintenance of multiemployer pension plans. PBGC therefore has a vital interest in its outcome.

STATEMENT

A. *Congress's Response to a Faltering Multiemployer Plan Program.*

The background and legislative history of both ERISA and MPPAA are set forth in detail in *Connolly v. PBGC*, 475 U.S. 211 (1986), and *PBGC v. R.A. Gray & Co.*, 467 U.S. 717 (1984). *See also Nachman Corp. v. PBGC*, 446 U.S. 359 (1980). We summarize here only those portions of that description relevant to the issues before the Court.

Congress enacted ERISA in 1974 to "guarantee that 'if a worker has been promised a defined pension benefit upon

---

[1] The PBGC is a wholly-owned federal government corporation whose Board of Directors is composed of the Secretaries of Labor, Commerce, and Treasury. The PBGC, which has independent litigating authority, 29 U.S.C. § 1302(b)(1), appears in this Court through its own counsel.

retirement—and if he has fulfilled whatever conditions are required to obtain a vested benefit—he actually will receive it.'" *Gray*, 467 U.S. at 720 (quoting *Nachman*, 446 U.S. at 375). To that end, Congress established in ERISA a comprehensive scheme for the regulation of private pension plans, including a pension plan termination insurance program to be administered and enforced by PBGC. 29 U.S.C. § 1302(a).

PBGC's insurance program, which covers both single-employer and multiemployer pension plans, was to be financed with premiums collected from all covered plans. 29 U.S.C. § 1306 (1976). When an insured single-employer plan terminated with insufficient assets to pay promised benefits, PBGC was obligated to pay participants certain basic benefits, 29 U.S.C. §§ 1361, 1381 (1976), and to collect any shortfall in the plan's assets from the employer, up to 30 percent of the employer's net worth. 29 U.S.C. § 1362(b) (1976). Congress delayed the mandatory guarantee of benefits in terminating multiemployer plans until 1978, however, and instead gave PBGC discretion whether to guarantee benefits upon plan termination. 29 U.S.C. § 1381(c)(2)-(4) (1976). When a multiemployer plan terminated, all employers that had contributed to the plan during the five years before its termination were liable to the PBGC for the shortfall in amounts proportional to their share of the plan's contributions during that period, subject to the 30 percent of net worth limitation. 29 U.S.C. § 1364 (1976).

In 1978, Congress further postponed a mandatory guarantee because the threat of multiemployer plan terminations posed an unacceptable risk to the insurance system. *Gray*, 467 U.S. at 720-22.[2] Indeed, ERISA's

[2] A 1978 PBGC report estimated that about ten percent of all multiemployer plans, covering 1.3 million participants, could terminate before 1988, costing the insurance system about 4.8 billion dollars, and requiring unacceptable premium increases. Pension Benefit Guaranty Corporation, ***Multiemployer Study Required by***

enactment may have exacerbated the problem by encouraging employers to withdraw from weak multiemployer plans. *Connolly*, 475 U.S. at 215-16; *Gray*, 467 U.S. at 722-24. The absence of immediate liability upon withdrawal permitted an employer to "withdraw from a plan leaving unfunded benefit obligations for his employees which must be paid by the remaining employers in the plan," and encouraged a "'last man out' mentality, with employers withdrawing from plans to avoid possible plan termination liability." 126 Cong. Rec. S10,100 (daily ed. July 29, 1980) (statement of Sen. Javits).

Accordingly, after several years of legislative and executive branch study, and after considering numerous alternatives, Congress enacted MPPAA. *Gray*, 467 U.S. at 723-25, 732. Under MPPAA, if an employer withdraws from a multiemployer plan, it incurs "withdrawal liability" to the plan. Withdrawal liability protects the financial stability of multiemployer plans and the retirement income of millions of participants by requiring withdrawing employers to continue funding their share of the plans' liabilities. Withdrawal liability, which is "a prophylactic extension of the liability initially imposed by ERISA," *Connolly*, 475 U.S. at 231 (O'Connor, J., concurring), is a "fixed and certain debt to the pension plan" that is "the employer's proportionate share of the plan's 'unfunded vested benefits.'" *Connolly*, 475 U.S. at 217 (quoting *Gray*, 467 U.S. at 725). By requiring a withdrawing employer to pay its fair "share of the plan obligations," *Connolly*, 475 U.S. at 225, Congress ensured that those obligations did not fall on the remaining employers and discourage new employers from joining the plans. *Gray*, 467 U.S. at 721-23. Withdrawal liability was thus the cornerstone of Congress's efforts to protect plan participants against benefit losses.

P.L. 95-214 138-39 (1978); *see* H.R. Rep. No. 869, 96th Cong., 2d Sess., pt. 1, at 56-57 (1980), *reprinted in* 1980 U.S.C.C.A.N. 2918, 2924.

B. *The Special Nature of Multiemployer Pension Plans.*

Congress's solution to the problem of underfunded multiemployer pension plans reflected the special nature of these plans. Multiemployer plans, by definition, are pension plans to which more than one employer is required to contribute, and are maintained pursuant to collective bargaining agreements. 29 U.S.C. § 1301(a)(3) (1988). *See also* 29 U.S.C. § 1002(37). Where a union participates in plan management, the plan must be jointly administered by representatives of labor and management under section 302(c)(5) of the Labor Management Relations Act of 1947 ("LMRA"), 29 U.S.C. § 186(c)(5).

Pension plans are either "defined contribution plans" or "defined benefit plans"; respondent is a defined benefit pension plan.[3] Because participants in a defined benefit plan receive a benefit only if they "vest," some participants in defined benefit plans never receive benefits. *See, e.g., Central States, S.E. and S.W. Areas Pension Fund v. Gerber Truck Serv.*, 870 F.2d 1148, 1154 (7th Cir. 1989) (en banc).[4] The benefits payable from a defined

[3] A defined contribution plan provides for contributions to an individual account for each participant and pays benefits based solely upon the value of the participant's account. 29 U.S.C. § 1002(34). The funding provisions of ERISA generally do not apply to such plans, 29 U.S.C. § 1081(a)(8), and such plans are not insured, 29 U.S.C. § 1321(b)(1). *See Connolly v. PBGC*, 581 F.2d 729, 733 (9th Cir. 1978), *cert. denied*, 440 U.S. 935 (1979). By contrast, a defined benefit plan, which is any plan that does *not* provide benefits based upon the value of the participant's account, 29 U.S.C. § 1002(35), promises a participant a fixed and definite benefit. *See Nachman*, 446 U.S. at 363 n.5. Most multiemployer pension plans are defined benefit plans.

[4] Benefits in a plan vest after a participant completes a specified period of service, 29 U.S.C. § 1053; thus, a plan's "vested benefits" include amounts payable in the future to participants who have not yet retired, as well as amounts currently being paid to retirees or their beneficiaries.

benefit plan depend on a formula that takes into account factors such as age, years of service, and salary.

The contributions made by employers participating in a multiemployer pension plan are pooled in a general fund and are based upon actuarial assumptions designed to assure that enough assets will be available to pay all benefits when due.[5] The pooled contributions of all employers are available to satisfy any benefit obligation under the plan. *See Lewis v. Benedict Coal Corp.*, 361 U.S. 459, 469 (1960) (pre-ERISA law); *British Motor Car Distribs. v. San Francisco Automotive Indus. Welfare Fund*, 882 F.2d 371, 378 (9th Cir. 1989); *Gerber Truck*, 870 F.2d at 1154; *O'Hare v. General Marine Transp. Corp.*, 740 F.2d 160, 173 (2d Cir. 1984), *cert. denied*, 469 U.S. 1212 (1985); *Local Union 5 Sheet Metal Workers' Int'l*

[5] The pooling of contributions enables employers to share the cost of providing pensions to their employees, reduce administrative costs, and increase investment options. *Washington Star Co. v. International Typographical Union Negotiated Pension Plan*, 582 F. Supp. 301, 303-04 (D.D.C. 1983), *aff'd*, 729 F.2d 1502 (D.C. Cir. 1984). These features are particularly beneficial in industries where

> there was little if any likelihood that individual employers would or could establish single-employer plans for their employees . . . , where there are hundreds and perhaps thousands of small employers, with countless numbers of employers going in and out of business each year, [and where] the nexus of employment has focused on the relationship of the workers to the union to which they belong, and/or the industry in which they are employed, rather than to any particular employer.

Multiemployer Pension Plan Termination Insurance Program: Hearings before the Subcomm. on Oversight of the House Comm. on Ways and Means, 96th Cong., 1st Sess. 50 (1979) (statement of Robert A. Georgine, Chairman, National Coordinating Committee for Multiemployer Plans). Such plans provide access to a trained labor supply that can move from employer to employer and project to project without a loss of service credit. *Washington Star*, 582 F. Supp. at 304; *see also* 29 U.S.C. §§ 1053(b)(1), 1060(a); 29 C.F.R. § 2530.210(c)(1) (1991) (portability of service credit mandatory).

Union v. Mahoning and Trumbull County Bldg. Trades Welfare Fund, 541 F.2d 636, 639 (6th Cir. 1976); *Hurd v. Hutnik*, 419 F. Supp. 630, 644 (D.N.J. 1976) (pre-ERISA law). Thus, for purposes of determining whether a multiemployer plan is for the "exclusive benefit" of an employer's employees and beneficiaries, *see* 26 U.S.C. § 401(a); 29 U.S.C. § 186(c)(5), all of the participants in the plan are considered to be the employees of each employer participating in the plan. 26 U.S.C. § 413(c)(2).

Under the Internal Revenue Code, moreover, the limits on the amount of contributions deductible are determined "as if all participants in the plan were employed by a single employer." 26 U.S.C. § 413(b)(7). *See Bituminous Coal Operators Ass'n v. Connors*, 867 F.2d 625, 628 (D.C. Cir. 1989). And consistent with the pooling of contributions and benefit liabilities, ERISA as originally enacted imposed upon employers a contingent termination liability based upon the aggregate unfunded liabilities of a terminating multiemployer plan. 29 U.S.C. § 1364 (1976). The pooling concept applicable to multiemployer pension plans has, accordingly, been deeply embedded in federal law for decades.

C. *The Statutory Process For Calculating Withdrawal Liability.*

Withdrawal liability is an employer's statutory share of the plan's "unfunded vested benefits," 29 U.S.C. § 1381(b)(1); thus, the first step in calculating withdrawal liability is calculating the plan's unfunded vested benefits. The plan's actuary, who is subject to regulatory and professional standards, 29 U.S.C. §§ 1241, 1242; 26 U.S.C. § 7701(a)(35); *see* 20 C.F.R. §§ 901.1-.71, determines the present value of a plan's liability for vested benefits in an actuarial valuation performed at least triennially, and in many plans, annually. *See* 29 U.S.C. §§ 1082(c)(9), 1393(b)(1). The actuarial valuation is a snapshot, as of a given date, of the present value of the plan's liability for those benefits.

To arrive at the present value of a plan's liability for vested benefits, the actuary must employ certain assumptions and methods. 29 U.S.C. § 1393(a). In general, after arriving at a total value of all vested benefits then earned by all participants, the actuary must discount that value by using certain actuarial assumptions. The actuary knows, for example, that some participants will die before receiving all or a portion of their benefits. Accordingly, the actuary uses a mortality assumption to discount the total value to reflect this contingency. Similarly, the actuary knows that some vested benefits will be satisfied by earnings on assets the plan is expected to accumulate for decades into the future. Consequently, the actuary uses actuarial interest rate assumptions to discount the liability for estimated future investment earnings over the period—often 40 years or longer—during which the vested benefits will be paid.[6] By law, the actuary's assumptions and methods must be "in the aggregate, . . . reasonable" and "offer the actuary's best estimate of anticipated experience under the plan." 29 U.S.C. § 1393(a).[7]

---

[6] As noted in the concurring opinion in *Connolly*, if the actuary's assumptions prove too conservative, the plan might have excess assets with which to increase benefits. 475 U.S. at 233. In the event the assumptions prove overly optimistic and the assets do not grow as projected, the plan may later have to increase the amount of required contributions; however, the law generally does not permit accrued benefits to be reduced. *See* 26 U.S.C. § 411(d)(6).

[7] PBGC is authorized to issue regulations governing such assumptions, 29 U.S.C. § 1393(a), but, due to the varying demographics and investments among multiemployer plans, has not determined it necessary to do so. MPPAA's "reasonable in the aggregate" standard, however, has a well-settled meaning in both the actuarial profession and the law. The standard is virtually identical to that contained in 29 U.S.C. § 1082(c)(3)(A)(ii) and 26 U.S.C. § 412(c)(3)(A)(ii), which govern actuarial assumptions used for determining the contributions required to be made to multiemployer pension plans. *See generally* D. McGill, *Fundamentals of Private Pensions* 242 (5th ed. 1984) [hereinafter "McGill"]; *Wachtell, Lipton, Rosen & Katz v. Commissioner*, No. 14574-90, slip op. at 9-18 (T.C. July 14, 1992).

After calculating the present value of the plan's vested benefits, the actuary deducts the value of the plan's assets to determine the amount of the plan's unfunded vested benefits. 29 U.S.C. § 1393(c). The actuary's valuation is then presented to the trustees of the plan.

In the second step in the process, the trustees must allocate the unfunded vested benefits pursuant to one of four statutory allocation methods, or a method approved by PBGC. 29 U.S.C. § 1391.[8] Respondent used the "presumptive" method set forth in 29 U.S.C. § 1391(b), which, as a "construction industry" plan, it is required to use for the plan's construction employers. *See* 29 U.S.C. § 1391(c)(1); 29 C.F.R. § 2642.2. Under that method, the plan determines a withdrawing employer's proportional share of each of three different categories of unfunded vested benefits.[9] Generally, the employer's share is derived from fractions comparing the employer's required contributions during a 5-year period to the contributions made by all employers during the same period. 29 U.S.C. § 1391(b)(2)(E)(ii), (b)(3)(B), (b)(4)(D)(ii).

In the third step, the trustees determine whether and when an employer has withdrawn. *See* 29 U.S.C. §§ 1383, 1385. Then, after considering on the basis of available facts whether any of MPPAA's "forgiveness provisions" apply, *see, e.g.*, 29 U.S.C. § 1405, the trustees issue a notice and demand for withdrawal liability. 29 U.S.C. § 1399(b)(1).

[8] By law, the trustees must select an allocation method before the withdrawal of any employer to which the method is applied. 29 U.S.C. § 1394(a). Likewise, all allocation methods are based on actuarial valuations performed for plan years preceding the employer's withdrawal, 29 U.S.C. § 1391, and the allocation method must "operate and be applied uniformly with respect to each employer." 29 U.S.C. § 1394(b).

[9] Those categories are (1) the employer's proportional share of post-1980 changes in the unfunded vested benefits; (2) its share, if any, of pre-1980 unfunded vested benefits; and (3) its share of reallocated unfunded vested benefits, if any (*i.e.*, amounts uncollectible or unassessable for reasons described in 29 U.S.C. § 1391(b)(4)). 29 U.S.C. § 1391(b)(1)(A), (B), (C).

The fourth step is mandatory conciliation. *See* 29 U.S.C. § 1399(b)(2). The employer is entitled to ask the trustees to review any specific matter relating to the determination of liability, identify any inaccuracies in the determination, or furnish any additional relevant information. 29 U.S.C. § 1399(b)(2)(A). The trustees then review the issues raised by the employer and notify the employer of their determination. 29 U.S.C. § 1399(b)(2)(B).[10]

The fifth step in the process, if a disagreement persists, is arbitration. The arbitration is to be conducted "in accordance with fair and equitable procedures," 29 U.S.C. § 1401(a)(2), that have been promulgated by the PBGC. *See* 29 C.F.R. pt. 2641. Unlike the calculation and issuance of the demand, 29 U.S.C. § 1399(b)(1), or the informal dispute resolution process of section 1399(b)(2), the arbitration is a trial-type adjudication. *See* PBGC Op. Ltr. 91-7 (Oct. 1, 1991) (MPPAA arbitration is a "hearing" that "afford[s] each side a full and equal opportunity to be heard").

In a MPPAA arbitration, both parties are typically represented by counsel. 29 C.F.R. § 2641.5(c). There is discovery similar to that under the Federal Rules of Civil Procedure. *See* 29 C.F.R. § 2641.4(a)(2). The parties file pre-hearing statements and exchange witness lists, 29 C.F.R. § 2641.4(a)(2); there is a hearing on the record, 29 C.F.R. § 2641.5(d); and each party may present witnesses and documentary evidence, and cross-examine the other party's witnesses. 29 C.F.R. § 2641.5(e)(3). The arbitrator is empowered to issue subpoenae for the

[10] This "informal review" is a "private ordering" that serves to "clarify and perhaps pare down the issues," *Grand Union Co. v. Food Employers Labor Relations Ass'n*, 808 F.2d 66, 78 (D.C. Cir. 1987), and may eliminate the need for litigation.

attendance of witnesses and the production of documents. 29 C.F.R. § 2641.4(a)(4). The parties are entitled to file post-hearing briefs. 29 C.F.R. § 2641.5(g). The arbitrator files a written opinion, giving the reasons for his award, including findings of fact and conclusions of law. 29 C.F.R. § 2641.7(a)(1). And this opinion may be reviewed in federal district court, 29 U.S.C. § 1401(b)(2), where the arbitrator's findings of fact may be reversed only if contrary to "a clear preponderance of the evidence." 29 U.S.C. § 1401(c). Questions of law are reviewed *de novo*. *See Chicago Truck Drivers Pension Fund v. Louis Zahn Drug Co.*, 890 F.2d 1405, 1411 (7th Cir. 1989).

Depending on the issues raised in the arbitration, two "presumptions" may be applicable. First, any factual determination made by the plan trustees under sections 1381 through 1399 and section 1405 "is presumed correct unless the [employer] shows by a preponderance of the evidence that the determination was unreasonable or clearly erroneous." 29 U.S.C. § 1401(a)(3)(A).[11] Second, the actuary's determination of a plan's unfunded vested benefits "is presumed correct unless [the employer] shows by a preponderance of evidence that—(i) the actuarial assumptions and methods used in the determination were, in the aggregate, unreasonable (taking into account the experience of the plan and reasonable expectations), or (ii) the plan's actuary made a significant error in applying the actuarial assumptions or methods." 29 U.S.C. § 1401(a)(3)(B).

[11] This provision is limited to factual determinations; by contrast, on questions of law, the arbitrator is directed to "follow applicable law," 29 C.F.R. § 2641.4(a)(1), and decide the case in the manner of a trial judge, as opposed to a commercial or labor arbitrator who tries to reach a compromise. *See* 126 Cong. Rec. H7899 (daily ed. Aug. 26, 1980) (statement of Rep. Thompson).

SUMMARY OF THE ARGUMENT

Petitioner Concrete Pipe and Products of California, Inc. ("Concrete") challenges a withdrawal liability assessment by the Construction Laborers Pension Trust of Southern California (the "Plan") that has been upheld by an independent arbitrator and two federal courts.[12] Concrete challenges the presumptions in 29 U.S.C. § 1401, but only the presumption in favor of actuarial assumptions is properly before the Court, and that presumption in no way implicates the "biased decisionmaker" case law on which Concrete relies. Moreover, even if the presumption afforded the factual determinations of plan trustees—which does nothing more than shift the burden of persuasion to the employer—were before the Court, Concrete's arguments rest on a mischaracterization of the non-adjudicatory functions that plan trustees perform in assessing liability. The trustees' role does not implicate due process concerns because it is ministerial and quasi-prosecutorial rather than adjudicative, and their institutional bias, if any, is remote and insubstantial. And, in any event, 29 U.S.C. § 1401(a) and regulations promulgated thereunder provided Concrete a plenary trial-type hearing before an independent adjudicator; consequently, the burden of proof did not deprive Concrete of a full and fair opportunity to present its case.

Concrete's contention that MPPAA violates substantive due process and the "takings" clause of the Fifth Amendment is controlled by this Court's unanimous decisions in *Connolly* and *Gray*. Concrete's arguments, moreover, rely on a misunderstanding of the nature of multiemployer

[12] The Ninth Circuit agreed with the arbitrator that Concrete's withdrawal occurred in 1981, after the effective date of MPPAA, J.A. at 216, 379, 431-32, and this Court declined to review the question. The Ninth Circuit also agreed with the arbitrator's reduction of the amount assessed, J.A. at 402, 432, a ruling neither party now contests. Accordingly, neither of these issues is before the Court.

pension plans, and ignore the fact that Concrete was on notice when it joined the Plan that the Plan was underfunded, that it could be responsible for a share of that underfunding on the basis of its contributions to the Plan, and that ERISA had invalidated liability disclaimer clauses like the one on which Concrete now relies.

All of Concrete's challenges are, consequently, without merit, and the decision of the court below should, therefore, be affirmed.

ARGUMENT

I. CONGRESS'S CHOSEN METHOD FOR RESOLUTION OF WITHDRAWAL LIABILITY DISPUTES DID NOT DENY CONCRETE PROCEDURAL DUE PROCESS.

Five of the six Courts of Appeals that have considered the issue have upheld both of the presumptions in 29 U.S.C. § 1401(a)(3) against procedural due process attack.[13] Only the Court of Appeals for the Third Circuit held otherwise, and that court addressed only the presumption in section 1401(a)(3)(A) applicable to factual determinations by plan trustees.[14]

Here, without distinguishing between the two presumptions, Concrete obtained a writ of certiorari with respect to a question regarding "the presumptions in 29 U.S.C.

[13] *Keith Fulton & Sons v. New England Teamsters & Trucking Indus. Pension Fund*, 762 F.2d 1137, 1140-43 (1st Cir. 1985) (en banc); *Board of Trustees v. Thompson Bldg. Materials*, 749 F.2d 1396, 1403-04 (9th Cir. 1984), *cert. denied*, 471 U.S. 1054 (1985); *Washington Star*, 729 F.2d at 1511; *Textile Workers Pension Fund v. Standard Dye & Finishing Co.*, 725 F.2d 843, 855 (2d Cir.), *cert. denied*, 467 U.S. 1259 (1984); *Republic Indus. v. Teamsters Joint Council No. 83*, 718 F.2d 628, 639-41 (4th Cir. 1983), *cert. denied*, 467 U.S. 1259 (1984).

[14] *United Retail & Wholesale Employees Teamsters Union Local No. 115 Pension Plan v. Yahn & McDonnell, Inc.*, 787 F.2d 128 (3d Cir. 1986), *aff'd by equally divided vote sub nom. PBGC v. Yahn & McDonnell, Inc.*, 481 U.S. 735 (1987).

§ 1401." In fact, however, only the presumption in section 1401(a)(3)(B)—the presumption afforded actuarial assumptions and methods—is properly before the Court.[15] That presumption does not even arguably implicate the "biased decisionmaker" line of cases on which Concrete relies, and the decision of the court below should, therefore, be affirmed.

A. Enrolled Actuaries, Not Plan Trustees, Are Responsible for Selecting Actuarial Assumptions.

Concrete argues that plan trustees perform an adjudicative function when they choose the actuarial assumptions used to calculate withdrawal liability, and that they are institutionally incapable of impartiality in performing this function. However, the selection of actuarial assumptions with which to calculate a plan's unfunded vested benefits is the responsibility of the plan's enrolled actuary, not the trustees.

Congress made it clear that actuarial assumptions must be "independently determined by the actuary," and that

[15] Of the three issues raised by Concrete in contesting the Plan's withdrawal liability assessment, only resolution of the actuarial assumption issue was potentially affected by use of a presumption. Both the arbitrator and the district court decided the date of withdrawal issue without regard to the presumptions in section 1401(a)(3), *see* J.A. at 205-16, 419-22, and Concrete prevailed as to the appropriate contribution history to be used in calculating its liability. And while the arbitrator referred to the statutory presumptions in his decision regarding Concrete's challenge to the Plan's actuarial assumptions, even there, he recited the presumptions only after having already reached his conclusion. *See* J.A. at 378-402.

Section 1401(c) also provides that, upon review of an arbitrator's decision, the district court is to presume, unless rebutted by a "clear preponderance of the evidence," that the findings of fact made by the arbitrator were correct. Here, however, the district court expressly found that the arbitrator's factual conclusions and inferences were reasonable, and not even "contrary to a *mere* preponderance." J.A. at 421 (emphasis added). Concrete was, therefore, also unaffected by this statutory presumption.

plan trustees may not "substitute [their] judgment in these matters for that of a qualified actuary." S. Rep. No. 383, 93d Cong., 2d Sess. (1974), *reprinted in* 1974 U.S.C.C.A.N. 4890, 4954. *See Keith Fulton*, 762 F.2d at 1141 n.3. Indeed, where it has been found that a plan's actuarial assumptions were *not* the actuary's "best estimate," but were instead dictated or influenced by the trustees, they have been struck down. *See, e.g., Casablanca Indus. v. UFCW Local 23—Giant Eagle Pension Fund*, 7 Employee Benefit Cas. (BNA) ("E.B.C.") 2705 (1986) (Jaffe, Arb.), *aff'd in relevant part sub nom. Huber v. Casablanca Indus.*, No. 87-0077, slip op. (W.D. Pa. Oct. 30, 1989), *aff'd*, 916 F.2d 85 (3d Cir. 1990), *petition for cert. filed*, 59 U.S.L.W. 3503 (U.S. Jan. 9, 1991); *cf. Carnation Co. v. Central States Pension Fund*, 9 E.B.C. 1409, 1428-29 (1988) (Nagle, Arb.). Moreover, if the actuary allows himself to be subjected to improper influence, his enrollment can be suspended or terminated. 29 U.S.C. § 1242(b).

Actuaries are, of course, in no sense "biased decisionmakers." Rather, they are trained and licensed experts charged by Congress with establishing the assumptions necessary for calculating a plan's unfunded vested benefits.

Congress's decision to assign this task to actuaries was eminently reasonable. In 1974, Congress had entrusted the determination of actuarial assumptions and methods for funding purposes to the professional judgment of the plan's enrolled actuary, 26 U.S.C. § 412(c)(3)(A), 29 U.S.C. § 1082(c)(3)(A), because "proper actuarial assumptions may differ substantially between industries, among firms, geographically, and over time. . . . [Thus,] any attempt to specify actuarial assumptions . . . would in effect place . . . plans in a straitjacket so far as estimating costs is concerned, and would be likely to result in cost estimates that are not reasonable." H.R. Rep. No. 807, 93d Cong., 2d Sess. 27 (1974), *reprinted in* 1974

U.S.C.C.A.N 4670, 4694. Six years later, when enacting MPPAA, Congress again turned to the actuarial profession to establish actuarial assumptions for withdrawal liability purposes, and adopted the same "reasonable" and "best estimate" standards for that purpose that had been in use for funding purposes. 29 U.S.C. § 1393(a). At the same time, Congress limited challenges to a showing that the actuary failed to conform to these standards. 29 U.S.C. § 1401(a)(3)(B). This limitation was necessary

> to reduce the likelihood of dispute and delay over technical actuarial matters with respect to which there are often several equally "correct" approaches. Without such a presumption, a plan would be helpless to resist dilatory tactics by a withdrawing employer--tactics that could, and could be intended to, result in prohibitive collection costs to the plan. The presumption can be rebutted in those cases where injustice would otherwise result to the withdrawing employer.

Sen. Comm. on Labor and Human Resources, 96th Cong., 2d Sess. *S. 1076: The Multiemployer Pension Plan Amendments Act of 1980: Summary and Analysis of Consideration* 20-21 (Comm. Print 1980) [hereinafter "Senate Labor Summary"]. *Accord* H.R. Rep. No. 869, pt. 1, at 86.

When challenging the actuary's unfunded vested benefit determination, however, the employer need only show "by a preponderance of the evidence" that "the actuarial assumptions and methods used . . . were, in the aggregate, unreasonable (taking into account the experience of the plan and reasonable expectations)," 29 U.S.C. § 1401(a)(3)(B)(i), or that the actuary made a "significant error" in applying them. 29 U.S.C. § 1401(a)(3)(B)(ii). Congress's decision to place the burden on employers to show that the actuarial assumptions are "unreasonable" makes sense, because actuarial assumptions are predictions about events that will occur over decades. *See Michigan United Food and Commercial Workers Pension Fund*

v. Eberhard Foods, Inc., 831 F.2d 1258, 1261 (6th Cir. 1987); *Keith Fulton*, 762 F.2d at 1143-44. Such assumptions cannot be said to be "correct" or "incorrect" unless one is willing to wait until the final participant dies and his annuity ceases, often 40 years or longer. Thus, imposing the burden on employers was in no way arbitrary. It simply reflected Congress's desire to avoid "lengthy, futile and costly bickering" over "matters with respect to which there are often several equally 'correct approaches,'" *Keith Fulton*, 762 F.2d at 1143 & n.7 (citations omitted), by which employers could "effectively nullify their obligation" by forcing the plan "to prove every element involved in making an actuarial determination." H.R. Rep. No. 869, pt. 1, at 86. *See also* Senate Labor Summary, *supra*, at 20-21. Such rational choices pass constitutional muster. *See Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 28 (1976); *Lavine v. Milne*, 424 U.S. 577, 585 (1976).

Nothing in the record here, moreover, indicates that Concrete was denied a fair hearing on the actuarial assumptions issue. The arbitrator, as the trier of fact, made a credibility determination that the Plan's enrolled actuary, a principal in a major firm that serves many multiemployer plans, was more persuasive than the employer's actuary, who had no multiemployer plan experience and who insisted that *only* the rates his firm used for its single-employer plan clients were reasonable. J.A. at 397-98. The district court agreed with the arbitrator. J.A. at 423. Notably, the statutory burden of proof has not prevented other employers from successfully challenging actuarial assumptions, including the interest rate assumptions that are the object of Concrete's attack.[16] That Concrete was unable to meet its burden in

[16] *See, e.g., Carnation*, 9 E.B.C. 1409 (actuarial assumptions and methods for imputing age and service data unreasonable and not actuary's "best estimate"); *Casablanca*, 7 E.B.C. 2705 (actuarial asset valuation not "best estimate" where dictated to actuary by

this case is not a basis for finding that burden constitutionally defective.

B. The Presumption Afforded the Factual Determinations of Plan Trustees Does Not Violate Procedural Due Process.

1. *Plan Trustees Perform No Quasi-Judicial Function and Have No Disabling Bias.*

Even if the presumption afforded the trustees' factual determinations were properly before the Court, it in no way implicates procedural due process concerns because plan trustees are neither "decisionmakers" nor "biased" in a constitutional sense.

The trustees' determination and demand for withdrawal liability is more the functional equivalent of the issuance of a civil complaint or administrative charge than an adjudication, as in *Marshall v. Jerrico*, 446 U.S. 238 (1980). In *Jerrico*, a federal agency administrator determined violations of a child labor law and assessed penalties under the statute, but the validity of the assessment was decided *de novo* by an administrative law judge. Like the administrator in *Jerrico*, the plan trustees under MPPAA "perform[] no judicial or quasi-judicial functions. [They] hear[] no witnesses and rule[] on no disputed factual or legal questions." *Jerrico*, 446 U.S. at 247. *Accord Stump v. Sparkman*, 435 U.S. 349, 360 (1978).

Rather, their functions of identifying employer withdrawals and applicable exemptions, calculating liability based on the actuary's valuation of unfunded vested benefits, demanding payment, and participating in informal review as a prelude to arbitration, all pursuant to explicit statutory directives, are "akin to that of a prosecutor or

trustees); *Woodward Sand Co. v. Operating Eng'rs Pension Trust*, 3 E.B.C. 2351 (1982) (Kaufman, Arb.) (actuarial assumption of rate of return on investment unreasonable).

civil plaintiff." *Jerrico*, 446 U.S. at 247. "[T]he strict requirements of neutrality cannot be the same . . . as for judges, whose duty it is to make the final decision and whose impartiality serves as the ultimate guarantee of a fair and meaningful proceeding in our constitutional regime." *Id.* at 250.

Even if plan trustees could be considered "adjudicators" in making their demand, they have no disqualifying bias. Trustees, who either receive a fixed salary or serve without pay if they are union or employer officials, 29 U.S.C. § 1108(c)(2), have no obvious, direct, or personal pecuniary interest in the outcome of withdrawal liability disputes. *Compare Jerrico*, 446 U.S. at 247, *with Tumey v. Ohio*, 273 U.S. 510 (1927). Nor, on this record, is there any evidence of actual bias against Concrete. *See, e.g., Taylor v. Hayes*, 418 U.S. 488 (1974).

Concrete points to trustees' fiduciary obligations as a putative source of bias. But fiduciary obligations do not permit or require a fiduciary to seek more from employers than the statute permits, nor to work at the outer limits of the permitted range of reasonableness.[17] To the contrary, in proper cases trustees may prudently compromise withdrawal liability claims. *See* 126 Cong. Rec. S23,288 (daily ed. Aug. 26, 1980) (statement of Senators Williams and Javits). *See also* Prohibited Transaction Exemption 76-1, 41 Fed. Reg. 12,740 (1976). By acting lawfully and reasonably, plan trustees are "without [the] apprehension of personal consequences" and "without [the] fear of suit" that would disqualify them from what Concrete erroneously suggests is a quasi-judicial function. *Stump*, 435 U.S. at 363, 364. *See* 29

[17] *See, e.g., Casablanca*, 7 E.B.C. 2705 (trustees impermissibly directed actuary to develop conservative assumptions benefiting fund at the expense of withdrawing employer, and thus assumptions did not represent actuary's "best estimate"). *See also Anita Foundations, Inc. v. ILGWU Nat'l Retirement Fund*, 902 F.2d 185, 190 (2d Cir. 1990) ("[t]he Fund cannot shield itself from liability by hiding behind its fiduciary status").

U.S.C. § 1323 (action or withholding of action required under Title IV of ERISA not a breach of fiduciary duty).

2. *A MPPAA Arbitration Provides an Employer with a Full and Fair Opportunity to Challenge a Withdrawal Liability Assessment.*

After the trustees have assessed liability and informal review has narrowed the issues to the extent possible, an independent arbitrator hears evidence in a plenary proceeding that approximates a trial. 29 C.F.R. §§ 2641.3(b) & (c), 2641.4, 2641.5. In this trial-type proceeding, the employer and the plan trustees are litigants, and the arbitrator takes evidence, makes credibility determinations and findings of fact, and issues a decision. 29 C.F.R. pt. 2641. He does *not* merely review a prior determination or record in the manner of an appellate tribunal. Indeed, there is no pre-existing record. Rather, the arbitration proceeding is in effect a trial *de novo* at which the employer may present any cognizable issue to the arbitrator, regardless of whether the issue was raised at the informal review stage. *See* PBGC Op. Ltr. 91-7 (Oct. 1, 1991).

In the arbitration proceeding, no issue is irrebuttably presumed in the plan's favor, and thus no "determinative issue" is foreclosed from independent arbitral consideration. *Stanley v. Illinois*, 405 U.S. 645, 656-57 (1972).[18] Indeed, the "presumptions" here do not operate like traditional presumptions at all. With a true "presumption," once a party proves fact A, fact B is deemed to be true. *See, e.g., Mathews v. Lucas*, 427 U.S. 495 (1976) (upon proof of specified facts, child is presumed to have been a dependent of deceased parent). But the "presumptions" in section 1401(a) merely shift the burden of proof to

[18] Cases rejecting "irrebuttable presumptions" under the Due Process Clause, *see, e.g., United States Dep't of Agric. v. Murry*, 413 U.S. 508 (1973); *Vlandis v. Kline*, 412 U.S. 441, 453 (1973), are accordingly distinguishable.

the employer to show that the plan was wrong.[19] Thus, the plan need not prove affirmatively every element underlying its claim: the employer must first come forward with its case, and the plan need only rebut the evidence the employer adduces. *See Washington Star*, 729 F.2d at 1511.

"Outside the criminal law area, where special concerns attend, the locus of the burden of persuasion is normally not an issue of federal constitutional moment." *Lavine*, 424 U.S. at 585. A legitimate allocation of the burden of proof need only have a rational basis, and assure that, in practical effect, a party is not precluded from presenting its case. *See, e.g., Turner Elkhorn*, 428 U.S. at 27-30; *Mobile, J. & K.C. Ry. v. Turnipseed*, 219 U.S. 35, 43 (1910). "There are no hard-and-fast standards governing the allocation of the burden of proof . . . . [It] 'is merely a question of policy and fairness based on experience in the different situations.'" *Keyes v. School Dist. No. 1*, 413 U.S. 189, 209 (1973) (quoting *Wigmore on Evidence* § 2486 (3d ed. 1940)). To prevail in a MPPAA arbitration, an employer need only prove "by a preponderance of the evidence," the traditional civil standard, that the plan trustees' initial determination of factual matters under MPPAA are "unreasonable" or "clearly erroneous," 29 U.S.C. § 1401(a)(3)(A).

Numerous aspects of a withdrawal liability assessment can be and are challenged under this standard. On such issues as the amount of the employer's required contributions, *see* 29 U.S.C. § 1391(b)(2)(E), the employer can overcome the "presumption of correctness" if it simply shows by a preponderance of the evidence that the plan made a mathematical mistake.[20] An employer may

[19] This Court has recognized that a statutory provision may be stated as a rebuttable presumption, but in fact do nothing more than allocate the burden of persuasion to a particular party. *See Lavine*, 424 U.S. at 584.

[20] *See, e.g., H.C. Elliott, Inc. v. Carpenters Pension Trust Fund*, 13 E.B.C. 1962, 1966 (1991) (Kagel, Arb.).

also challenge such determinations as the fact and date of a withdrawal as well as the availability of statutory exemptions and moderating provisions,[21] and to the extent that these determinations involve factual disputes, the employer can overcome the "presumption of correctness" by coming forward with a preponderance of evidence to the contrary.[22] To the extent that such disputes entail statutory interpretation, the arbitrator makes an independent judgment, based on "applicable law, as embodied in statutes, regulations, court decisions, interpretations of the agencies charged with the enforcement of the Act, and other pertinent authorities." 29 C.F.R. § 2641.4(a)(1).[23] Indeed, as Concrete concedes, the arbitrator in this case, interpreting 29 U.S.C. § 1384, reduced Concrete's liability by over 25 percent because the Plan had erroneously included a predecessor employer's contribution history in its calculation. J.A. at 392-93; Pet. Br. at 18 n.9.

[21] It is perfectly reasonable to require the employer to bear the burden of proof on such issues, since it will usually have superior access to the facts concerning such issues as the date it ceased operations, 29 U.S.C. § 1383(a), the existence of a labor dispute, 29 U.S.C. § 1398(2), or the existence of a qualifying sale of assets, 29 U.S.C. § 1384. *See generally* 9 *Wigmore on Evidence* § 2486 (Chadbourn rev. ed. 1981).

[22] *See, e.g., Building Servs. Employees Pension Trust v. Ogden Allied Servs. Corp.*, 10 E.B.C. 1401, 1410 (1988) (Brand, Arb.) (factual determination regarding timeliness of withdrawal liability demand); *PMTA-ILA Pension Fund v. E.W. Coslett & Sons, Inc.*, 6 E.B.C. 2705, 2714-15 (1985) (Jaffe, Arb.) (factual determination regarding "closed facility" reduction under 29 U.S.C. § 1397).

[23] *See, e.g., Ogden*, 10 E.B.C. at 1410-14 (plan's interpretation of section 1385(b)(2)(A)(i) and determination of partial withdrawal overturned, applying traditional tools of statutory construction); *Del Monte Corp. v. Bakery & Confectionery Union & Indus. Pension Fund*, 8 E.B.C. 1574, 1577-81 (1986) (Nagle, Arb.) (plan's attribution of contribution history to purchaser contrary to plain language of 29 U.S.C. § 1384); *Coslett*, 6 E.B.C. at 2716 (plan's determination of date of withdrawal incorrect under 29 U.S.C. § 1383(e)).

The standards of 29 U.S.C. § 1401(a)(3) are accordingly rational and do not "foreclose[] fair and effective consideration at a subsequent adversary hearing leading to ultimate decision." *Withrow v. Larkin*, 421 U.S. 35, 58 (1975). Indeed, as the arbitration decisions cited above clearly indicate, arbitrators have had no difficulty applying independent judgment to questions of credibility, fact, and law, notwithstanding the statutory "presumptions." And this is precisely what was done by the arbitrator in this case. J.A. at 205-16, 378-402.

II. CONCRETE'S SUBSTANTIVE DUE PROCESS AND TAKINGS CHALLENGES ARE CONTROLLED BY *CONNOLLY* AND *GRAY*.

Concrete's substantive due process and takings arguments are controlled by the Court's unanimous decisions in *Gray* and *Connolly*, upholding MPPAA against "facial" attacks on these grounds. Concrete attempts to show that MPPAA is unconstitutional as applied in this case; however, virtually all of its arguments were fully addressed by the Court's prior decisions. To the extent they were not, they reflect a fundamentally flawed understanding of multiemployer plans.

A. MPPAA Did Not Deny Concrete Substantive Due Process.

Concrete argues that it was irrational for Congress to link the amount of its withdrawal liability to its contributions to the Plan. As this Court held in *Gray*, however, Congress plainly had a rational and sound purpose for enacting MPPAA—to discourage employer withdrawals from multiemployer plans. 467 U.S. at 730. Congress was concerned, after the passage of ERISA, that multiemployer plans would experience an increase in employer withdrawals and a diminishing contribution base, causing failing plans to overwhelm PBGC's insurance program. *See* pp. 2-3, *supra*. Withdrawal liability, which represents the withdrawn employer's proportionate share of the plan's underfunding, restores the loss to the

plan's contribution base caused by the employer's withdrawal. *See generally Gray*, 467 U.S. at 721-25; *Peick v. PBGC*, 724 F.2d 1247, 1267 (7th Cir. 1983), *cert. denied*, 467 U.S. 1259 (1984). It was, therefore, perfectly logical for Congress to base an employer's liability on its prior contributions to the plan.

In *Connolly*, this Court observed that Congress's allocation of liability to employers who participated in a plan was a reasonable legislative choice:

> We are far from persuaded that fairness and justice require the public, rather than the withdrawing employers and other parties to pension plan agreements, to shoulder the responsibility for rescuing plans that are in financial trouble.

475 U.S. at 227. Whether Congress should have chosen one particular cost-spreading formula over another to achieve its purpose is "not a question of constitutional dimension." *Turner Elkhorn*, 428 U.S. at 19 (citations omitted). Indeed, numerous decisions of the Court teach that federal courts do not sit as a super-legislature to reassess the wisdom of a given legislative formula. *E.g.*, *National R.R. Passenger Corp. v. Atchison, T. & S.F. Ry.*, 470 U.S. 451 (1985); *Ferguson v. Skrupa*, 372 U.S. 726 (1963); *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955).[24]

---

[24] Congress did, in fact, legislate an alternative method for allocating a plan's unfunded liabilities that directly links an employer's withdrawal liability to the benefits earned by its employees. *See* 29 U.S.C. § 1391(c)(4). However, "[f]or most multiemployer plans, the method would be completely impracticable . . . more expensive and more cumbersome." McGill, *supra*, at 574; *see also* J. Stephen Caflisch, *Employer Withdrawal Liability Under the Multiemployer Pension Plan Amendments Act of 1980*, 9 Pens. Rep. (BNA) 182, 190 (1982) (direct attribution method "would require extensive data that most plans do not have . . . [and] is fundamentally inconsistent with the basic nature of multiemployer plans"); Frank Cummings and Alicia Kershaw, *Multiemployer Plans—Special Rules*, 359-2d Tax Mgmt. (BNA) A-15 (1990) [hereinafter "Cummings"].

Here, because Congress was concerned about withdrawals resulting in a diminishing contribution base for multiemployer plans, it linked an employer's withdrawal liability to its contributions, and then also designed an installment payment schedule for the liability that allows an employer to pay on roughly the same basis as it had been contributing. *See* 29 U.S.C. § 1399(c)(1); H.R. Rep. No. 869, pt. 1, at 82-83.[25] Congress thus "approach[ed] the problem of cost spreading rationally." *Turner Elkhorn*, 428 U.S. at 19. Due process requires no more. *Id. Accord Ferguson*, 372 U.S. 726; *Lee Optical*, 348 U.S. 483.[26]

Concrete next argues that MPPAA violates due process by imposing liability when "none of its employees participated long enough to have any 'vested service' attributable to employment [with Concrete]." Pet. Br. at 28. Referring to the concurring opinion of Justices O'Connor and Powell in *Connolly*, which suggests that the imposition of withdrawal liability might, under certain circumstances, raise due process concerns, Concrete contends the statute is constitutionally infirm because "there is no relationship" between Concrete's conduct and any detriment to its employees. Pet. Br. at 27. However, Concrete's

[25] *See also* Gerald Cole and Ellen Hennessy, *Multiemployer Withdrawal Liability*, 1 Pens. and Profit Sharing (P-H) ¶ 1010, at 1016 (1984) (installment payment schedule "maintain[s] roughly the same level of payments as the employer's required contributions before withdrawal").

Contributions, moreover, reflect the size of a withdrawing employer's workforce, and a larger workforce equates with more employee service, which gives rise to additional benefits under the plan. Consequently, a contribution-based fraction reflects both the employer's workforce and the liabilities it has imposed upon the plan.

[26] Significantly, the contingent termination liability established by ERISA was also based on the amount of an employer's contributions to a multiemployer plan. *See* 29 U.S.C. § 1364 (1976). Because Concrete joined the Plan after the enactment of ERISA, it was on notice that it was undertaking a potential liability for the Plan's underfunding based on its share of the contributions to the Plan. *Connolly*, 475 U.S. at 226-27.

argument simply ignores the design and function of multiemployer pension plans.

As discussed above, the essence of a multiemployer pension plan is the pooling of assets and liabilities by a group of employers. *See* McGill, *supra*, at 78-79. Typically, employers agree to contribute a certain amount for each hour an employee works—a collectively bargained formula that reflects numerous actuarial assumptions about the demographics of the entire pool of participants, rather than those of any particular employer's workforce. *See generally* Cummings, *supra*, at A-2; McGill, *supra*, at 237-38, 376. The plan then combines the contributions of all of the employers and pays benefits out of the pool of funds to the broader universe of plan beneficiaries. Thus,

> [t]he whole purpose behind multiemployer pension plans is to pool resources to pay all participants their accrued benefits; withdrawal liability serves the purpose of protecting the pool and thus the "benefit security" of participants in the plan. Withdrawal liability is therefore more than an obligation to one's employees; it is an obligation to the Fund, the participants in it, and the other contributing employers.

Central States Pension Fund v. Bellmont Trucking Co., 610 F. Supp. 1505, 1513 (N.D. Ind. 1985), *aff'd*, 788 F.2d 428 (7th Cir. 1986) (citations and footnote omitted). Accordingly, because employers participating in a multiemployer plan have, by definition, elected to pool contributions and share the costs of providing benefits to their employees, it was in no way unreasonable for Congress to require that those employers pay their share of that unfunded liability upon leaving. It was instead rationally related to MPPAA's purposes of "discourag[ing] voluntary withdrawals" and "cushion[ing] the financial impact [of withdrawals] on the plan." *Connolly*, 475 U.S. at 217. *See also* 29 U.S.C. § 1001(a)(4), (c)(2), (c)(3).

Moreover, even though none of Concrete's employees may have vested solely as a result of their service with Concrete, it is possible—indeed, probable—that some of

those employees will vest in their benefits under the Plan when their service with Concrete is added to service with previous and future employers. Under Concrete's reasoning, the employer who fortuitously employed an employee in the year he vested would pay the entire bill. But that is not the way multiemployer plans work. *See Gerber Truck*, 870 F.2d at 1154, 1155; *O'Hare*, 740 F.2d at 173-74.

In the long run, a particular employer's contributions will approach the value of the liabilities associated with its employees. While this proposition may be more uncertain over the short term, that is a risk that a business takes when it joins a multiemployer pool.[27] Moreover, by sharing the costs of providing pensions, employers contributing to multiemployer plans are able to provide a benefit package that is less costly to the employer and more valuable to its employees, *see Washington Star*, 582 F. Supp. at 304, one that "the employer might himself have established in his own economic interest." *Roark v. Boyle*, 439 F.2d 497, 505 (D.C. Cir. 1970). Accordingly, it is not remarkable, and certainly not irrational, that Congress chose to base an employer's withdrawal liability on that employer's contributions to the plan rather than on the benefits paid by the plan to any one set of workers.

Concrete further argues that MPPAA violates substantive due process because it abrogated purported limitations on its liability set forth in its collective bargaining agreement and in the Plan documents. This argument was fully and dispositively addressed in *Connolly*. As the Court there said:

> "Contracts, however express, cannot fetter the constitutional authority of Congress. Contracts may create rights of property, but when contracts deal with a

[27] By joining a multiemployer plan, an employer gambles that its employees, as a whole, will vest more regularly and earn benefits higher than the pool median. If that happens, the employer is paying less than if it had contributed to a plan established solely for its own employees.

> subject matter which lies within the control of Congress, they have a congenital infirmity. Parties cannot remove their transactions from the reach of dominant constitutional power by making contracts about them."
>
> If the regulatory statute is otherwise within the powers of Congress, therefore, its application may not be defeated by private contractual provisions.

475 U.S. at 223-24 (quoting *Norman v. Baltimore & O. R.R.*, 294 U.S. 240 (1935)). *See also Turner Elkhorn*, 428 U.S. at 15; *Philadelphia, B. & W. Ry. v. Schubert*, 224 U.S. 603, 614-15 (1912).

Significantly, Concrete joined the Plan post-ERISA. With the enactment of ERISA in 1974, employers were on notice that if they withdrew from an underfunded multiemployer plan, they had a contingent liability for a share of the plan's underfunding. *Connolly*, 475 U.S. at 226-27; *Gray*, 467 U.S. at 721. And Concrete's collective bargaining agreement explicitly recognized that the Plan language purporting to limit liability was valid only "if permitted by law under ERISA," J.A. at 82, which it was not. *See United Mine Workers of America Health and Retirement Funds v. Robinson*, 455 U.S. 562, 575 (1982); *Nachman Corp. v. PBGC*, 592 F.2d 947, 957-58 (7th Cir. 1979), *aff'd*, 446 U.S. 359 (1980).

Finally, Concrete contends that MPPAA is unfairly retroactive as applied to it because a portion of its withdrawal liability stems from unfunded liabilities that existed before it joined the Plan. Concrete was, however, on notice when it voluntarily joined the Plan that it was subject to potential liability under ERISA for its share of the Plan's underfunding. *Cf. Connolly*, 475 U.S. at 226-27. And in any event, the benefit increases about which Concrete complains were required either by court order or by ERISA itself. Pet. Br. at 8-9.[28]

[28] Concrete also insists that it is being held liable for benefit increases that occurred after it temporarily ceased operations in 1979; however, the lower courts ruled that Concrete did not incur

B. The Imposition of Withdrawal Liability Is Not a Taking of Concrete's Property Under the Fifth Amendment.

Because the imposition of withdrawal liability does not violate Concrete's due process rights, "it would be surprising indeed to discover" that "Congress unconstitutionally had taken the assets of [Concrete]." *Connolly*, 475 U.S. at 223. And indeed the Court unanimously held in *Connolly* that MPPAA's withdrawal liability provisions do not, on their face, constitute an unlawful taking of property. 475 U.S. at 224. Concrete nevertheless claims that the same provisions are unconstitutional "as applied" here but makes not a single argument in support of that claim that was not addressed dispositively in *Connolly*.[29]

Thus, as in *Connolly*, Concrete contends that the economic impact of MPPAA is severe because the amount of withdrawal liability imposed on it allegedly comprises a significant portion of its net worth. *Connolly*, 475 U.S. 223. But, as the Court observed, "[i]n the course of regulating commercial and other human affairs, Congress routinely creates burdens for some that directly benefit others." *Id.* The Court further noted that the assessment "is not made in a vacuum" but "directly depends on the relationship between the employer and the plan to which it had made contributions." *Id.* at 225. Here, moreover, the assessment was significantly moderated by an installment payment schedule, in this case eleven years long. *See* 29 U.S.C. § 1399(c)(1); J.A. at 91. Thus, "the mere fact that the employer must pay money to comply with

---

s withdrawal until it permanently ceased operations in 1981, and that ruling is not before the Court.

[29] Contrary to Concrete's suggestion, this Court's categorical takings analysis has no applicability to this case. *See Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886, 2893 (1992). In *Lucas*, the Court noted that such analysis has been confined to regulations that "compel the property owner to suffer a physical 'invasion' of his property," and regulations that "den[y] all economically beneficial or productive use of land." *Id.*

the Act is but a necessary consequence of the MPPAA's regulatory scheme." *Connolly*, 475 U.S. at 226.

Pointing to the concurring opinion of Justices O'Connor and Powell in *Connolly*, Concrete makes much of its lack of control over investment, benefit, and other decisions that may have increased the unfunded benefit obligations of the Plan, and argues that there was therefore no relationship between its conduct and the withdrawal liability assessment. But "[a]ctual consideration of [employer] interests is . . . likely, given management's statutory right to select half of the trustees." *Peick v. PBGC*, 539 F. Supp. 1025, 1048 (N.D. Ill. 1982), *aff'd*, 724 F.2d 1247 (7th Cir. 1983), *cert. denied*, 467 U.S. 1259 (1984). And even if Concrete was in fact disempowered, it voluntarily elected to enter into this relationship. *Cf. NLRB v. Amax Coal Co.*, 453 U.S. 322 (1981) (rejecting identical argument under the National Labor Relations Act). Concrete did, moreover, avail itself of the benefits of a multiemployer plan, including the pooling of assets, liabilities, and administrative costs, and access to a skilled workforce, which are "sufficient compensation" for the "correlative burden" MPPAA placed on it. *See Noble State Bank v. Haskell*, 219 U.S. 104, 111 (1911).

Certainly, the Court's decision in *Connolly* fully disposes of Concrete's contention that it had a "reasonable investment-backed expectation" that the collective bargaining agreement and Plan documents would limit its liability. As the Court held, the government has taken nothing for its own use, but "only has nullified a contractual provision limiting liability by imposing an additional obligation that is otherwise within the power of Congress to impose." *Connolly*, 475 U.S. at 224. Here, moreover, the "contractual provision" itself made clear that it was valid only if "permitted by law under ERISA." J.A. at 82; Pet. Br. at 6.[30]

---

[30] Significantly, there was no testimony in this "as applied" challenge that Concrete's employees believed or understood that the Plan's promise of benefits was conditional. *Cf. Connolly*, 475 U.S. at 230-31 (O'Connor, J., concurring).

Finally, as for the nature of the governmental action, as the Court said in *Connolly*, "under the Act, the Government does not physically invade or permanently appropriate any of the employer's assets for its own use" but rather "safeguards the participants in multiemployer pension plans by requiring a withdrawing employer to fund its share of the plan obligations incurred during its association with the plan." 475 U.S. at 225. Thus, Congress simply adjusted the benefits and burdens of economic life in an area that it initially regulated in the LMRA in 1947, and has regulated in comprehensive and reticulated detail in ERISA since 1974. Such economic regulation has long been the province of Congress and does not constitute a taking. *Connolly*, 475 U.S. at 225; *Turner Elkhorn*, 428 U.S. at 15-16.

CONCLUSION

The decision of the Ninth Circuit affirming Concrete's withdrawal liability should be affirmed.

Respectfully submitted,

CAROL CONNOR FLOWE *
General Counsel
JEFFREY B. COHEN
Deputy General Counsel
ISRAEL GOLDOWITZ
Assistant General Counsel
RUSSELL G. GALER
NATHANIEL RAYLE
Attorneys

PENSION BENEFIT GUARANTY CORPORATION
2020 K Street, N.W.
Washington, D.C. 20006
(202) 778-8820

* Counsel of Record